(54)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 677

WILLIAM FRASER, Petitioner

VS.

UNITED STATES OF AMERICA, Respondent.

REPLY OF PETITIONERS TO THE OPPOSITION BRIEF FILED BY UNITED STATES,

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THE DAILY NEWS

SUBJECT INDEX

AUTHORITY CITED

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No. 805

WILLIAM FRASER, Petitioner

VS.

UNITED STATES OF AMERICA, Respondent.

REPLY OF PETITIONERS TO THE OPPOSITION BRIEF FILED BY UNITED STATES,

TO THE HONORABLE JUDGES OF THE SUPREME COURT:

Your Petitioner feels that a brief reply should be made to the Government's argument.

I.

THE QUESTION OF THE TWO-WITNESS RULE

On page 13 of the Government's Brief, there is cited the case of U. S. vs. Weiler, 143 Fed. (2d), 204, (C.C.A.3), Certiorari granted October 9, 1944, No. 340. The Gov-

ernment seeks to distinguish the Weiler case from the instant case by saying that in the Weiler case the Petitioner did not admit the falsity of his testimony, but that in the instant case, the Petitioner Fraser has admitted that his testimony was false.

We submit that this distinction does not exist for two reasons, first, Weiler did admit the falsity of his testimony. Weiler's testimony was of that direct and positive nature that it called directly upon him to admit or deny, being that he had not purchased new tires in March, 1942. The facts cited in the Opinion show that he actually did purchase such tires, which he concedes, and his entire defense is an effort to explain.

In the instant case, the Petitioner has nowhere admitted the falsity of his original testimony assigned as perjury. He concedes that he signed a check in 1942, which was used to pay a mortgage then existing, but this is in no sense an admission of the falsity of his testimony, because his testimony in the Civil Trial was that he did not recall, or did not remember, or did not know at the time of testifying, and it was not that he did not do so. This is made plain beyond question by the fact that as Petitioner entered upon his trial in the District Court, he signed a Stipulation, paragraph 3 of which covers fully and sufficiently the extent of his concessions. R. p. 49.

Further, the evidence cited in the Opinion of the Circuit Court of Appeals as corroborative, was nothing more than cumulative to what the Stipulation already showed, that is, the mere fact that a payment was made in 1942.

Now Petitioner's testimony in the Civil Trial was that he did not know the facts as to this matter at the time. He was indicted upon a mere excerpt from that testi-

mony, and it is necessary, in order to arrive at the true purport of same, to consider not only the portion excerpted and embodied in the indictment, but also the other questions and answers along the same line, all of which taken together, are necessary to spell out his real testimoney. Please see Petition & Brief for such, pp. 8-16; 20-21

When taken in this light, and read with the other questions and answers made by the Petitioner in the Civil Trial, just precedings are following the excerpt used, it is clear that his actual testimony was simply that he did not know, and it was not a denial of the existence or payment of the mortgage in 1942.

His testimony simply embodied the experience of a great many business people, who, when unexpectedly called upon about a single transaction, can truthfully say that they do not know and can only offer, as did this Petitioner, to go get the records to speak for themselves.

In truth, the documentary evidence cited by the Learned Circuit Court of Appeals as being sufficient to dispense with the charge to the Jury on the Two-Witness Rule, was nothing more than a mere enlargement and accumulation of the facts as already stipulated at the beginning of the trial and in reality contributed nothing thereto.

II.

MATERIALITY OF EVIDENCE.

Over Petitioner's insistence that the testimony extracted of Fraser was not material to any issue in the Civil case, the Circuit Court of Appeals said:

> "The 'Propositions to be found' are disclosed in the pleadings in the Civil action. The main issue was, whether the sales agreement between Barton and his associates and the Fraser-Britton associates was a contract for the sale of the cotton by the Defendants as Barton's agents, or whether it was an outright sale to them. Appellant's testimony as to his disposition of the money relates to the nature of the contract. *If he treated the money received as his own, that fact would have some tendency to support his understanding of the contract.*"

This exceedingly tenuous connection is all that the Learned Circuit Court of Appeals seems able to find.

If Fraser had offered such testimony about his own acts in the disposition of money to support his understanding of the contract, the Trial Court would, and should, have promptly ruled it out as being a self-serving sort of "practical interpretation" made by one party after the fact. Such a privilege accorded to one of two contracting parties to manufacture evidence in his behalf by his conduct, after the fact, would be dangerous as a doctrine in litigation over contracts. The Trial Court would have ruled that such evidence was not only self-serving, but was immaterial and wholly irrelevant to any issue, as indeed it was, throwing no light whatever on the question at issue, to-wit: What was the contract?

Fraser either (1) owned the money, and owed Barton, or (2) held the money as selling agent for Barton. What Fraser did with the money would not, and could not, throw any light on whether it was (1) or (2).

The fact that the Learned Circuit Court of Appeals can find no stronger connection to show materiality is highly significant that none exists.

The Solicitor General, in his Opposition Brief, does suggest one other feature (Opp. Brief, p. 17), where he points out that the "pleadings" raise the question of whether Fraser was to pay the Government Tax or whether it was to be paid by Barton. How, we ask, could the testimony extracted of Fraser about his disposition of the money throw any light on that question? Which proposition does it prove or tend to prove? That Fraser was to pay the penalty? Or Barton?

Whether Fraser drew a check and paid off a mortgage in 1942, or left the money in the bank would throw no light on whether or not he had, some months before, agreed to pay a Government Tax.

REAL PURPOSE OF TESTIMONY

The real purpose of the inquiry was to further a "fishing expedition" to locate funds or property in possession of Fraser so that a judgment would be collectable by execution, but no one had a judgment at the time and the whole case was to determine *who was entitled to a judgment*, and the inquiry was premature.

Now, it is possible that if the attachment laws of Tennessee, which were available, had been used, the inquiry might have been relevant thereunder, but the pleadings in the case do not seek and obtain an attachment. R. pp. 356 and 357.

In one place (R. 356), the Government's suit does ask for an attachment against a certain lock box, but no attachment issued. Instead, the Government also prayed (R. p. 357):

> "That the Defendants be required to show cause why they have not paid or turned over to the United States of America the penalty or tax due it as aforesaid, and that they be required by mandatory process issued out of this Court to pay into the Court in this proceeding such sums of money as may be in their hands or under their control which came into their hands as the penalty on the marketing of the cotton involved in this suit;"

The process issued in response was not an attachment, but an injunction or restraining order (R. p. 364) and the method followed throughout was the exercise of a supposed mandatory power of the Court to order parties and witnesses to turn over money. (R. p. 379). Thus, instead of proceeding by attachment, the pleadings in this case proceed by the issue of the mandatory processes of the Court, and the supposed power of the Court to order money turned over from parties and witnesses, relying upon the sheer strength of the Court. There was no judgment, no attachment, no lien, just a "fishing expedition" carried on as a side line to the real questions involved in the Civil case, *none of which tended to establish the real issue.*

THE REAL ISSUE

In the original Petition (p. 22) Petitioner took the position that there was no issue existing in the Civil Trial over the question of whether the sale was outright or whether Fraser and Britton were mere selling agents; that on the contrary, it had been expressly conceded that the sale was an outright sale. R. pp. 221, 226, 227 and 228.

In the Government's Brief (p. 17), it is claimed that the pleadings alone must be looked to and these pleadings do not disclose this concession. That is true, the plead-

ings do not. But the concession was made in the course of the trial in the Civil case. We would not feel at liberty to rely upon the record in the Civil cause, but for the fact that the Government, in its Opposition Brief, on page 8 (Footnote 2) has stated that the Government has lodged with this Court a copy of the Opinion of the Circuit Court of Appeals in the Civil case; and the further fact, that the Civil case is now pending before this Court on Petition for Certiorari.

So, under these circumstances, we feel we are justified in referring to the Civil Record, No. 805, cause, pages 537 and 584, where the Attorney for the original parties, Barton, et al., concedes in the record that the transactions between Barton and Fraser were outright sales. This being true we now refer to the Opinion of the Circuit Court in the instant case, (R. p. 474) where that Court states that the main issue was whether it was an outright sale or a selling agency proposition. Thus we see that, in reality, that issue was eliminated by the concession of the original Plaintiffs, and no longer remained, and yet, that is the only issue stated in the case to which the Circuit Court ties the testimony extracted of Petitioner, and made the basis of the indictment, *to justify its materiality.*

Clearly, we most respectfully submit, this Honorable Court should grant Certiorari in this cause.

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